

Objection to the Issuance of Confined Feed Operation
Section 3, T15N, R11E, Farm ID #6771 / Animal Waste #AW-6293
Ag Production Enterprises, Inc.
Fayette County, Indiana
2013 OEA 31, (13-S-J-4657)

OFFICIAL SHORT CITATION NAME: When referring to 2013 OEA 31 cite this case as
Ag Production Enterprises, Inc., 2013 OEA 31.

TOPICS:

hearing
confined feeding
odor
air emissions
sufficiency of evidence
comments
statutory construction
authority

PRESIDING LAW JUDGE:

Catherine Gibbs

PARTY REPRESENTATIVES:

IDEM: April Lashbrook, Esq.
Petitioners: Walter J. Gray
Permittee: Daniel McInerny; Bose McKinney & Evans LLP

ORDER ISSUED:

August 19, 2013

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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2. The Approval permits the Permittee to construct and operate two swine confinement buildings, each building with a capacity of 4,400 wean-to-finish hogs.
3. Walter J. Gray (the “Petitioner”) filed his petition for review of the Approval on May 23, 2013.
4. The hearing was held on August 9, 2013.
5. The Petitioner owns property adjacent to Stant Farm. The Permittee indentified Mr. Gray as an “adjoining property owner” in the Application.¹
6. The Petitioner did not file comments in response to the notice regarding the Application. IDEM’s Exhibit #1 and #2.
7. The Petitioner testified that he was concerned about odor and air pollution and the effect the CFO would have on the value of his property. He introduced articles relating to how air emissions from CFOs affect nearby residents, but produced no evidence regarding this Facility and the impact on him personally. Mr. Gray’s daughter testified to possible negative health effects from air emissions.
8. The Petitioner did not review the Application. He did not introduce any evidence regarding deficiencies in the Application or design of the CFO.
9. The Permittee supplemented the Application on April 11, 2013. The IDEM issued one Notice of Deficiency on April 18, 2013 regarding the use of masonry columns. The IDEM determined that the April 11, 2013 Supplement was sufficient to address this deficiency.
10. The IDEM conducted a routine site visit on April 30, 2013. No deficiencies were noted.

Applicable Law

The OEA must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the ELJ, I.C. 4-21.5-3-27(d). Deference to the agency’s initial determination is not allowed. *Id.*; “*De novo* review” means that, “all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.” *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247, 253 (Ind. Ct. App. 1981).

¹ Respondent’s Exhibit #2.

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The powers of administrative agencies are limited to those granted by their enabling statutes. *Howell v. Indiana-American Water Co.*, 668 N.E.2d 1272, 1275 (Ind. Ct. App. 1996), *trans. denied*. The Court in *Lee Alan Bryant Health Care Facilities, Inc. v. Hamilton*, 788 N.E.2d 495, 500 (Ind. Ct. App. 2003) held, “An agency, however, may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law.”

“It is not a proper function of this court to ignore the clear language of a statute and, in effect, rewrite the statute in order to render it consistent with a particular view of sound public policy. *See, e.g., Robinson v. Monroe Cnty.*, 663 N.E.2d 196 (Ind. Ct. App. 1996) (concluding that court could not ignore unambiguous language of statute’s exemption of particular class of individuals from abiding by certain safety requirement regardless of court’s view as to the wisdom of the exemption).” *T.B. v. Indiana Department of Child Services*, 971 N.E.2d 104, 110 (Ind. Ct. App. 2012), *trans. denied*.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management (the “IDEM”) is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq.* The OEA has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*, and per I.C. § 4-21.5.3.7(a)(1)(A).
2. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. The Indiana legislature promulgated the statutes which establish public policy in relation to the regulation of CFOs and gave the Water Pollution Control Board the authority to promulgate rules to carry out legislative intent. The Water Pollution Control Board² promulgated the regulations regarding CFOs. It is the IDEM’s duty to apply these statutes and regulations. The Court in *Howell v. Indiana-American Water Co.*, 668 N.E.2d 1272, 1275 (Ind. Ct. App. 1996), cited above, clearly established that the IDEM’s authority to regulate CFOs is limited to the parameters set out in these statutes and regulations.
4. Likewise, the OEA’s authority is limited to determining whether the IDEM has properly applied the applicable statutes and regulations. As the Court in *T.B. v. Indiana Department of Child Services*, 971 N.E.2d 104, 110 (Ind. Ct. App. 2012) held, the OEA has no authority to substitute its judgment for the legislature’s or rulemaking boards’ determinations of public policy.

² This board was replaced by the Environmental Rules Board, effective July 1, 2012.

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5. The Petitioner testified to his concern about how pollutants from the Facility, including air emissions and odor, could have a detrimental effect on his health. The IDEM does not have any authority to regulate air emissions or odor from a CFO nor does the IDEM consider the affect on property values. Therefore, the Petitioner cannot prevail on these grounds. The Petitioner failed to present any evidence that this Facility did not comply with the applicable regulations or that it presented a threat to human health or the environment.
6. The Petitioner did not produce any evidence that the Application was deficient or that the CFO did not meet all of the applicable requirements in Indiana statutes and regulations.
7. The Petitioner has the burden of proving that the IDEM erred in issuing the Approval. However, he has failed to present sufficient evidence to meet this burden. Therefore, judgment should be entered in favor of the IDEM and the Permittee. The Approval should be sustained.

FINAL ORDER

AND THE ELJ, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that judgment is entered in favor of Ag Production Enterprises, Inc. and the IDEM.

You are further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5. Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 19th day of August, 2013 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge